IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 236

INTERNATIONAL STEVEDORING COMPANY,
A CORPORATION, PETITIONER

against

R. HAVERTY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF WASHINGTON

REPLY BRIEF OF PETITIONER

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PREFATORY STATEMENT

In this case a writ of certiorari was granted (U. S. Adv. Ops. 1925-6, p. 135) to review the decisions of the Supreme Court of Washington, sitting in Department and *en banc* (134 Wash. 235, 245; 235 Pac. 360; 238 Pac. 581; R. 22, 28). This cause was number 789 of the October term 1925 and has now become No. 236 of the October term 1926. Pursuant to advice from the Clerk, the petitioner has not filed a new opening brief but rests the case on its merits on the brief submitted in support of the petition when originally filed in this court. To the petition and brief the respondent has now filed a brief on

the merits, and the purpose of the present brief is to make a reply thereto.

STATEMENT OF THE CASE

The facts in this case are essentially without dispute. Perhaps a slightly fuller restatement than has been heretofore made will be helpful. The respondent was a member of one of the stevedoring crews designated by the defendant to load the ship, all of the members of the crew being in the employ of the petitioner. Such a stevedoring crew usually consists of ten to twelve men (R. 78): two dock men who handle the loads on the dock and adjust them in the loading sling; a hatch tender on deck, who when the load is being made up on the dock stands at the rail of the ship to see that everything is all right about the load coming up, and who, when the load is ready on the dock, signals the winchman to raise the load above the ship's rail until the winchman can see it himself, and then walks from the rail of the ship to the edge of the open hatch to see whether everything is all right in the hold below for the next load, and if so he signals the winchman to bring the load over the hatchway and to lower away, at the same time yelling to the stevedores in the hold to look out below; a winchman on deck operating the winch for hoisting the cargo from the dock to the ship and lowering it into the hold through the hatchway; and six men in the interior of the hold stowing away the cargo; and last of all the foreman, known as the "hatchboss," who has charge of the

entire gang, including the hatchtender, who is but an ordinary member of the crew having a certain portion of the work to perform just like the men in the hold. The hatchboss has charge of only one stevedoring crew; other similarly constituted crews under the general direction of the defendant and each under a different hatchboss work the other hatches of the ship, of which there were eight on the ship in question (R. 73). The respondent at the time of his injury was working with his crew on the number 8 hatch.

The negligence complained of by the plaintiff as alleged in his amended complaint and as sought to be proved at the trial, was that "without any warning or signal or notice of any kind from the hatchtender or anyone else, plaintiff was suddenly struck by a load of wool weighing between twelve hundred and eighteen hundred pounds and injured in the manner and to the extent hereinafter set forth, which injuries resulted directly and proximately from the carelessness and negligence of the hatchtender in failing to give signal of the lowering of the said load of wool" (R. 5). This statement becomes necessary because the respondent (Brief p. 2) in this court for the first time makes the assertion that the negligence of the petitioner consisted of "violation of an agreement with the respondent which prohibited the lowering of a load whilst the men in the open hatchway were stowing away a previous load." There is neither pleading nor proof to that effect in the record, nor has such claim been heretofore made in this case, nor is such claim referred to by the Supreme

Court of Washington, which fully states the facts. There is no allegation or testimony of any agreement between the parties concerning the giving of signals. What the respondent pleaded and relied on at the trial was the failure to give the customary warning of the descent of the load. The action as brought by the respondent is not one for breach of contract but for negligence. Possibly the respondent means to say no more than this when he states that the "*negligence* of the petitioner" consisted of "violating an agreement." Moreover, the respondent predicates his whole argument on tort liability and frankly concedes that "the *tort* is maritime in nature, and liability should be judged by maritime standards" (Brief p. 2).

ARGUMENT

The respondent's much subdivided and interesting brief may be reduced to, and answered as, the following propositions:

1. That, entirely apart from any statute, the maritime law as administered by the Federal courts (which respondent frankly concedes is controlling) in the specific case here involved, *should be* other and different from that contended for by the petitioner, and as it has been laid down by the Federal courts over a long period of years.

2. That if the fellow-servant rule has been heretofore properly applied by the maritime courts in stevedoring cases in the manner petitioner contends, it was impliedly abrogated by the Jones Act which declared a new public policy with reference to "seamen."

In support of the first proposition, the respondent, without as much as mentioning or seeking to differentiate the admiralty cases exactly in point on the same state of facts cited in the petitioner's brief, contends that the view of the Federal courts sitting in admiralty is not sufficiently enlightened, and that the rule should be otherwise. In the course of his argument the respondent cites certain Federal cases which will be analyzed in this reply brief, and which will be shown not to be in point.

In support of the second proposition the respondent contends, not very vigorously, that while the Jones Act applies in terms only to "seamen" and not to maritime workers such as stevedores who take no part in the duties of navigation, still since that statute

abrogates the fellow-servant rule as to "seamen," this court, even in the absence of a legislative declaration, should abrogate the fellow-servant rule as to stevedores. This contention will be shown to be contrary to the Federal cases expressly ruling on this point. Moreover, the upholding of this contention would require this court without the aid of legislation, to abrogate the fellow-servant rule in stevedoring cases contrary to the principle laid down in *Beutler v. Grand Trunk Ry.*, 224 U. S. 85, where the court, speaking through Mr. Justice Holmes said:

> "The doctrine as to fellow-servants may be, as it has been called, a bad exception to a bad rule, but it is established, and it is not open to courts to do away with it upon their personal notions of what is expedient."

I.

Under the Maritime Law the Failure of the Hatchtender or Signalman in a Single Instance to Give Customary Warning to the Stevedores in the Hold Before the Next Load Comes Down is the Negligence of a Fellow-Servant in Carrying Out an Operative Detail.

In the brief filed in support of the petition this petitioner has set out the admiralty cases exactly in point on the same state of facts supporting the contention of this petitioner. These cases are from the 9th Circuit, the 5th Circuit, and the 2nd Circuit, and are absolutely uniform in supporting the petitioner's contention. Since the writ was granted in this case the Circuit Court of Appeals for the 9th Circuit has

rendered another decision which fully supports the contention of your petitioner on the same state of facts.

Carstensen v. Hammond Lumber Co., 11 F. (2d) 142.

Two state cases exactly in point are,

Ocean Steamship Co. v. Cheney, 86 Ga. 276, 12 S. E. 351;

Hortense v. Coal Co., 101 Wis. 574, 77 N. W. 875.

Moreover, it is pointed out in the brief in support of the petition that, in addition to the Federal courts sitting in admiralty, the Federal courts sitting at common law, including this court, have uniformly decided the specific question here involved in favor of your petitioner.

As a matter of fact the wholly isolated status of the rule laid down by the Supreme Court of Washington in this case is well described in Labatt, Master and Servant (2d Ed.), Sec. 1537, as follows:

> "Frequent attempts have been made to bring the negligence of servants deputed to give signals within the scope of the principle that the duty to maintain a safe place of work is non-delegable. But this contention is rejected, *except in Washington*, where a servant who has been designated to give signals which control the movements of machinery, is, while so acting, held to be doing the work of the master."

Indeed the Supreme Court of Washington, in a later case than the present one, recognizes its isolated position on the point here in question. In *Reynolds*

v. International Stevedoring Co., ... Wash. ....., 245 Pac. 1, the court says (p. 2):

> "Indeed, we seem to be classed by Mr. Labatt as standing alone with respect thereto (Labatt, Master and Servant (2d Ed.) § 1537)."

The petitioner thus having the uniform support of Federal courts for its position and the uniform support of the courts elsewhere except in the State of Washington, as said by Mr. Labatt, it remains only to reply briefly to those cases which the respondent asserts support his position. In general, it may be said that none of the cases cited by the respondent are in point on the question here involved. Without, however, analyzing each one of the many cases cited by the respondent, it will only be attempted in this argument to analyze briefly the cases from this court which the respondent claims support him.

The respondent (Brief pp. 4, 27) cites *Union Pacific v. Fort*, 17 Wall. 553. That case is not at all in point. It relates solely to the failure to warn a youthful servant of peril in a matter outside of the servant's usual employment. The general non-delegable duty of a master to give general instructions and general warning at least once to inexperienced or youthful servants when sending them for the first time to work in a place and with appliances which are safe for experienced workmen, but which may be dangerous for the inexperienced, must not be confused with the duty of the master with reference to work in the course of which working signals from one servant to another become necessary from time to time as a detail of the work (*Maine and N. H.*

Granite Co. v. Hatchey, 173 Fed. (C. C. A.) 785). The master's duty in such a case, according to the unanimous opinion of the Federal courts in both admiralty and common law cases, is to furnish a competent fellow-servant to carry out this operative detail of giving warning signals from time to time as they become necessary; and in the absence of proving that the master was negligent in his selection of the servant designated to carry out that detail of the operation, the master is not liable in case of damage from negligence in that regard.

The next case cited by the respondent (Brief pp. 4, 27) is *Wabash v. McDaniel*, 17 Otto. 454. There was no question of the negligence of fellow-servants in that case. The case deals solely with the amount of care a master must exercise in the selection and retention of co-employees. The negligence there charged was negligence of the master in selecting and retaining fellow servants. That question is not in the present case because it is undisputed that the hatchtender whose duty it was to give the signals was a competent fellow servant.

Mather v. Rillston, 156 U. S. 391, also cited by the respondent (Brief pp. 4, 27), is another case relating to an inexperienced servant, to a youth who had never been advised of danger. The case is like *Union Pacific v. Fort, supra*, 17 Wall. 553, and is disposed of with the argument made in connection with the latter case.

Santa Fe v. Holmes, 202 U. S. 438, cited by the respondent (Brief pp. 4, 27) is not in point at all. There is no question of warning in the case. The

court held that the negligence of the railroad there consisted in wrongly administering the system of keeping trains in relation. Counsel say (Brief p. 27) that *Santa Fe v. Holmes, supra,* overrules *Northern Pacific v. Dixon,* 194 U. S. 339, cited by petitioner. The statement is unwarranted because the court does not expressly undertake to overrule nor does it impliedly overrule *Northern Pacific v. Dixon.* The distinction between the two cases is obvious.

Respondent (Brief pp. 4, 28) also cites *Kreigh v. Westinghouse,* 214 U. S. 249. Far from supporting the position of the respondent, that case supports the position of the petitioner as is demonstrated by the analysis of that case made in the brief supporting the petition, pp. 38-39. This court there held that the employer was not liable for the failure to give a warning signal in the course of operation because it was the negligence of fellow servants, but held there was also evidence of defective machinery; and that there was, therefore, a question for the jury whether the injurious effect of the derrick "was not attributable to faults of construction and equipment *as well as to negligent operation at the time of the injury.*" The court held that while the employer was not liable for the negligence of the fellow servants in pushing the bucket against the plaintiff without warning, it might be liable for negligence in the construction and equipment of the derrick if that negligence contributed to the cause of the injury.

In *Standard Oil Co. v. Brown,* 218 U. S. 78, cited by respondent (Brief pp. 4, 28), the charge was that the defendant never told the plaintiff of a hole in

the loft through which bailed straw was tossed. The servant was utterly ignorant of the existence of the hole or of the likelihood that anything might be thrown through it. The court held it to be the employer's "duty to inform those whose employment made it necessary to be in the stable, of the danger to them of the use to which the hole was put. * * * If plaintiff had had knowledge of the situation and its dangers he might have needed no warning from Coleman and might have been protected by the care which such knowledge would have induced." The case was held to be one for the jury. The present case is entirely different and deals solely with the failure of one member of a stevedoring crew to give the usual working signal to another member of the stevedoring crew who is fully experienced and is cognizant of all the details of the physical situation in which he is working.

McGovern v. Philadelphia, 235 U. S. 389, and *Reed v. Director General*, 258 U. S. 92, cited by respondent (Brief p. 7) have no application here. They both arise under the Federal Employer's Liability Act which abolishes the fellow-servant rule and leaves open only the question of defense of assumed risk, which question was held to be for the jury.

Brown v. Pacific Coast Coal Company, 241 U. S. 571, likewise cited by the respondent (Brief p. 7) is not in point. It relates solely to the duty of a Federal court to follow a local rule relating to inspection under a state statute.

Atlantic Transport Company v. Imbrovek, 234 U. S. 52, cited by respondent (Brief p. 8) relates to the

failure of an employer to furnish a safe place to work and is not in point here. The negligence there charged was the failure to pin down loose hatch covers.

Standard Oil Company v. Anderson, 212 U. S. 215, cited by respondent (Brief p. 8) is not in point. The question there was whether persons on the same job, not employed by the same master, are fellow-servants. This court held that they were not. That was the only question decided.

Miller's Indemnity Underwriters v. Brand, decided February 1, 1926, U. S. Adv. Ops. 1925-6, page 211, referred to by respondent (Brief p. 14) is not in point. The court there expressly reaffirms that the law relating to stevedores injured upon navigable waters is beyond the regulatory power of the state.

The case of *St. Louis v. Jeffries*, 276 Fed. 73, cited several times by the respondent, is entirely different from the case at bar. There was no question of fellow servant in the case. The case arose under the Federal Employers' Liability Act which abolishes the fellow-servant rule. The sole question there at issue was whether a custom existed to give working signals. If the custom existed it was held to be the duty of the master to provide for the giving of signals, and that if the master failed to make provision for signals, where it was the custom of the business, he would be liable. Whether such custom existed was held to be a question for the jury. In the present case it is conceded that the master selected a competent hatchtender to give the signals, so that the question involved in *St. Louis v. Jeffries, supra*, is not in the present case.

The length to which counsel are required to go to sustain their position is demonstrated by a statement (Brief p. 30) that the railroad cases cited by the petitioner (which are exactly in point on the same state of facts involved in the present case) must be disregarded as not being in conformity with present public policy. The doctrine of those cases, while now changed by the adoption of the Federal Employers' Liability Act, which eliminates the fellow-servant rule, does represent the law of master and servant as administered by the Federal courts in the absence of statute. Those cases contain the mature reffections of this court upon liability for negligence and are therefore precisely in point in all similar cases that are unaffected by the enactment of any statute.

Exactly the same answer applies to respondent's argument (Brief p. 43) that the Jones Act has "by implication" done away with the admiralty cases in which this court applies the fellow-servant rule, and made them "contrary to the dictates of public policy" in cases wholly unaffected by statute.

The respondent likewise (Brief p. 37) indulges in a severe, and we believe wholly unwarranted, criticism of the decisions of the Circuit Court of Appeals for the Ninth Circuit with reference to the fellow-servant doctrine. This criticism is doubtless induced by the fact that the cases of *The Hoquiam*, 253 Fed. 627, and *Carstenson v. Hammond Lumber Company*, 11 Fed. (2d) 142, both cases exactly in point here, were both decided by the Circuit Court of Appeals for the Ninth Circuit. However, not only are those decisions correct; but the same result on the same

state of facts was reached by the Circuit Court of Appeals for the Fifth Circuit in *Gulf Transit Company v. Grande*, 222 Fed. 817 (heretofore cited in petitioner's brief) and by Circuit Judge Morrow of the Second Circuit in *The Cedric*, 299 Fed. 815.

In the ultimate analysis the respondent's position on what the maritime law should be with reference to the doctrine of fellow-servant in the specific state of facts here involved, would require this court to upset the settled and accepted decisions of the Federal courts over a long period of years—decisions which have been rested, and rightly so, upon the law as laid down by this court—and would likewise require this court to wipe out a large number of its own prior decisions containing the considered judgment of this court on analogous facts where the failure of a co-worker during the course of operation to give the customary warning signal in a single instance to the damage of another servant was held to be the negligence of a fellow servant, and that the master was not liable on the theory that he had failed to furnish a safe place to work or safe appliances (petitioner's brief, pp. 21, 35).

II

The Jones Act Has No Bearing on the Present Case

The respondent argues, not very strenuously, that since the Jones Act abolishes the fellow-servant rule as to "seamen" by importing the provisions of the Employers' Liability Act, the policy of the law has been so changed as to require this court, even in the absence of a statute, to wipe out the fellow-servant doctrine in the case of maritime employees who are not "seamen," to-wit, stevedores. A brief twofold answer can be given to this argument.

In the first place, counsel for the respondent in addressing the trial court in this case said (R. 151):

> "I might call your attention to this fact that a stevedore is not a seaman. * * * And I can answer that immediately by saying that he [the stevedore] has never been considered a seaman and that he is not a seaman."

If a stevedore is not a seaman, then, adopting counsel's own quoted statement, the abolition of the fellow-servant rule as to "seamen" does not abolish it as to stevedores.

In the second place, it has been held in carefully considered cases that the Jones Act which applies to "seamen" in no way affects the fellow-servant doctrine in cases relating to longshoremen who are not "seamen" and have nothing to do with the navigation of the vessel.

Cassil v. United States Emergency Fleet Corporation (C. C. A.), 289 Fed. 774;

The Hoquiam (C. C. A.), 253 Fed. 627;

Grimberg v. Admiral Oriental Line, 300 Fed. 619, 620;

Martis v. Union Transfer Company, 202 N. Y. Supp. 56, citing *Ellis v. U. S.*, 206 U. S. 246.

In *Washington v. Dawson & Company*, 264 U. S. 219, 227, this court suggested that Congress might enact a general employer's liability law containing provisions for compensating injured stevedores, expressly recognizing that there was not at that time, just as there is not now, a statute of Congress relating to personal injuries of stevedores and other maritime workers who are not seamen.

III

Reply to Brief of Amici Curiae

Petitioner has just been served with a somewhat extended brief by friends of the Court signed by Arthur Griffin, George F. Vanderveer, and S. B. Bassett. This argument may be very briefly answered. These counsel, while seeking to sustain the judgment below, take a position diametrically opposed to the respondent's, in that they claim that the present case is not governed by the maritime law, and that the state court has the right to apply peculiarly local rules to personal injury cases arising on navigable waters, whereas the respondent frankly concedes (Brief p. 2) "that the tort is maritime in nature, and liability should be judged by maritime standards." The argument of the *amici curiae* may be disposed of by the citation of the following cases:

Southern Pacific v. Jensen, 244 U. S. 205;

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149;

Chelentis v. Luckenbach Steamship Co., 247 U. S. 372;

Great Lakes Dredge and Dock Co. v. Kierejewski, 261 U. S. 479;

Washington v. Dawson & Co., 264 U. S. 219;

Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449.

In *Chelentis v. Luckenbach Steamship Company, supra*, 247 U. S. 372, this court held that state courts in deciding admiralty cases must apply the rules of the admiralty law and not the local common law rules. This doctrine was reaffirmed in *Carlisle Packing Company v. Sandanger*, 259 U. S. 255.

In *Robins Dry Dock & Repair Co. v. Dahl, supra*, 266 U. S. 449, the court said:

> "The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. *No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by the state court.* The error is manifest and material."

In *Southern Pacific v. Jensen, supra*, 244 U. S. 205, the court said (p. 215):

> "In the absence of some controlling statute the general maritime law *as accepted by the Federal Courts*, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."

In *Knickerbocker Ice Co. v. Stewart, supra*, 253

U. S. 149, the court held (p. 160) that the Federal constitution in adopting the maritime law,

> "took from the states all power, by legislation or *judicial decision*, to contravene the essential purpose of, or to work any injury to characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations."

The argument of the *amici curiae is predicated* largely upon statements found in the dissenting opinions in *Southern Pacific v. Jensen* and *Knickerbocker Ice Company v. Stewart.* Those dissents have, however, not become the law of this court.

A conclusive answer to the argument of the *amici curiae* is found in the last paragraph of *Washington v. Dawson & Company,* 264 U. S. 219, a stevedoring case, where this court said (p. 228):

> "Of course some within the states may prefer local rules; but the union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The constitution is supreme."

IV
CONCLUSION

The present case is one which, unhampered by any controlling statute, must be decided pursuant to the fundamental principles of law governing the relation of master and servant as laid down by the Federal courts over a long period of years. The master's duty is one of reasonable care; he is liable for negligence only; he is not an insurer. The duty which he cannot delegate is the duty to exercise reasonable care. Performance of a non-delegable duty does not mean a guarantee of safety but means the exercise of reasonable care. How does a master exercise reasonable care with reference to the giving of working signals during the progress of the work? The master under the uniform Federal decisions and, according to Labatt on Master and Servant, (2d Ed.) Section 1537, under the uniform decisions elsewhere *except in the State of Washington*, exercises reasonable care by providing a competent fellow servant to give the signals during the progress of the work. In the nature of things, the master, in the exercise of reasonable care, cannot do more. The applicable rule is stated by this court in *Northern Pacific R. R. Co. v. Dixon*, 194 U. S. 338, as follows (p. 346):

> "Before an employer should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the injury. He cannot be personally present everywhere and at all times and, in the nature of things, cannot guard

against every temporary act of negligence by one of his employees."

In *Kreigh v. Westinghouse*, 214 U. S. 249, this court said (p. 256):

> "The master is not held responsible for injuries resulting from the place becoming unsafe through the negligence of a workman in the manner of carrying on work, where he, the master, has discharged his primary duty of providing a reasonably safe place for his employees to carry on the work, nor is he obliged to keep the place safe at every moment so far as such safety depends on the due performance of the work by the servant and his fellow servants."

In the present case the undisputed facts show that the master provided a safe place, a safe winch, *and a competent fellow-servant* to give the working signals to the stevedores in the hold each time a load came down. The undisputed facts show no liability whatever for negligence.

It is submitted that the decision of the majority of the Supreme Court of the State of Washington in this case utterly destroys the harmony and uniformity of the admiralty law which is required by the Constitution of the United States and which is firmly established by this court in many decisions. *Knickerbocker Ice Co. v. Stewart*, 253 U. S., 149; *State of Washington v. Dawson & Co.*, 264 U. S. 219; *Robins Dry Dock and Repair Co. v. Dahl*, 266 U. S. 449, and cases there cited. The incongruous condition now existing is that if a plaintiff, on the precise evidence here involved, brings his action *in the Federal court* in Seat-

tle, Washington, the defendant will, under the admiralty decisions of the Circuit Court of Appeals for the Ninth Circuit and the uniform holdings of the Federal courts sitting in admiralty elsewhere, prevail as a matter of law, on the ground that the negligence of a hatchtender, gangwayman, or signalman in failing, in a single instance, to give the customary working signal to the stevedores in the hold of a vessel that the next load is coming down, is the negligence of a fellow-servant in carrying out an operative detail, and that the master is not liable on the theory that he has failed to furnish a safe place to work or safe appliances. On the other hand, if the same plaintiff should bring his action, on the same state of facts, *in the State court* in Seattle, Washington, the defendant, under the decision of the Supreme Court of Washington in this case, is utterly deprived of the defense of a fellow-servant given him by the maritime law, since the failure of the hatchtender, in a single instance, to give the customary warning signal to the stevedores in the hold that the next load is coming down, is held by the Supreme Court of Washington in this case, in its avowedly novel decision upon the maritime law, to be the negligence of the master in failing to provide a safe place to work, and not the negligence of a fellow-servant. The decision of the Supreme Court of the State of Washington in this case deprives your petitioner and all others similarly situated of a defense clearly granted by the admiralty law and the Constitution of the United States as interpreted by the Federal courts, introduces a conflicting local rule, and destroys the harmony and

uniformity which should prevail in the admiralty law throughout every part of the Union, whether applied by the State or Federal courts.

As pointed out in the brief in support of the petition, the trial court and the Supreme Court of Washington erred in refusing to direct a verdict for your petitioner on the ground that it conclusively appeared from the evidence that the injury of the respondent was caused by fellow-servants. Under all the Federal authorities, both in admiralty and at common law, the petitioner is entitled to have the present action dismissed because the evidence fails to prove any liability whatsoever.

Moreover, the trial court instructed the jury that if they found that the hatchtender's failure to give the working signal in the single instance in question was the proximate cause of the injury, they must render their verdict against the petitioner and for the respondent. This is an error of law which if there were any other evidence to support a claim of liability of the petitioner, would merely require a new trial. But since under the authorities the evidence is insufficient to make out a case of liability, the judgment of the Supreme Court of Washington and of the trial court should be reversed with directions to dismiss the action.

The same statement may be made with reference to the instruction of the trial court who *expressly withdrew from the consideration of the jury entirely the defense of fellow-servant, stating that it was not a defense.* If there were other evidence of liability this instruction would merely require a new trial, but

in view of the fact that there is no evidence to create any legal liability, the respondent's action should be dismissed. The same argument applies to the refusal of the trial court and of the Supreme Court of Washington to grant petitioner a judgment notwithstanding the verdict. On account of such failure the judgment should be reversed with directions to dismiss the action.

We respectfully urge upon this Honorable court that the judgments of both the trial court and of the Supreme Court of Washington are erroneous, and should be reversed on the ground that no liability on the part of your petitioner is shown and directions given to dismiss the action.

Respectfully submitted,

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